

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

MITCHELL LEE VARNELL,

Plaintiff,

v.

KENNETH SAWYER, DOUGLAS
MCCARTY, JOHN DOE CORRECTIONS
OFFICER DRIVERS, STEVEN
HAMMOND,

Defendants.

CASE NO. 3:15-CV-05443-BHS-DWC

ORDER DIRECTING SERVICE OF
CIVIL RIGHTS COMPLAINT

Plaintiff Mitchell Varnell, proceeding *pro se* and *in forma pauperis*, filed this civil rights Complaint pursuant to 42 U.S.C. § 1983. Plaintiff is currently incarcerated at the Stafford Creek Correctional Center and is subject to the Court's Mandatory Electronic E-Filing Pilot Project ("E-Filing Pilot Project) pursuant to General Order 02-15. Presently pending before the Court is Plaintiff's Motion to Amend and Amended Complaint. Dkt. 7, 9. The Court grants Plaintiff's Motion to Amend as a matter of course, and directs service of the Amended Complaint.

A. Background

On June 30, 2015, Plaintiff initiated this lawsuit by filing a Motion to Proceed *In Forma Pauperis* ("IFP") and the Complaint. *See* Dkt. 1, 4. The Court granted the Motion to Proceed IFP on July 1, 2015. Dkt. 3. After review of the Complaint, the Court ordered Plaintiff to show cause

1 why his Complaint should not be dismissed for failure to state a claim or file an amended
 2 complaint. Dkt. 5. Plaintiff filed a Motion for Leave to File an Amended Complaint and his
 3 Amended Complaint on August 19, 2015. Dkt. 7, 9.

4 **B. Motion to Amend**

5 Pursuant to Rule 15(a)(1) of the Federal Rules of Civil Procedure,

6 A party may amend its pleading once as a matter of course within:

7 (A) 21 days after serving it, or

8 (B) if the pleading is one to which a responsive pleading is required,
 21 days after service of a responsive pleading or 21 days after
 9 service of a motion under Rule 12(b), (e), or (f), whichever is
 earlier.

10 Plaintiff filed the Motion to Amend and Amended Complaint prior to service and prior to the
 11 filing of a responsive pleading. *See* Docket. This is Plaintiff's first Amended Complaint.

12 Therefore, Plaintiff has the right to file the Amended Complaint as a matter of course. "When the
 13 plaintiff has the right to file an amended complaint as a matter of course, [] the plain language of
 14 Rule 15(a) shows that the court lacks the discretion to reject the amended complaint based on its
 15 alleged futility." *Thomas v. Home Depot U.S.A., Inc.*, 2007 WL 2140917, * 2 (N.D. Cal. July 25,
 16 2007) (*quoting Williams v. Board of Regents of University System of Georgia*, 477 F.3d 1282,
 17 1292 n. 6 (11th Cir. 2007)). Accordingly, Plaintiff's Motion to Amend is granted.

18 **C. Service of Amended Complaint**

19 The Court, having reviewed Plaintiff's Amended Complaint, hereby ORDERS as
 20 follows:

21 (1) Service by Clerk

22 The Clerk is directed to send the following to the named defendants by first class mail: a
 23 copy of plaintiff's complaint, a copy of this Order, two copies of the notice of lawsuit and

request for waiver of service of summons, a waiver of service of summons, and a return envelope, postage prepaid, addressed to the Clerk's Office.

(2) Response Required

Defendant(s) shall have **thirty (30) days** within which to return the enclosed waiver of service of summons. A defendant who timely returns the signed waiver shall have **sixty (60) days** after the date designated on the notice of lawsuit to file and serve an answer to the complaint or a motion permitted under Rule 12 of the Federal Rules of Civil Procedure.

A defendant who fails to timely return the signed waiver will be personally served with a summons and complaint, and may be required to pay the full costs of such service, pursuant to Rule 4(d)(2) of the Federal Rules of Civil Procedure. A defendant who has been personally served shall file an answer or motion permitted under Rule 12 within **thirty (30) days** after service.

(3) Filing and Service by Parties, Generally

All attorneys admitted to practice before this Court are required to file documents electronically via the Court's CM/ECF system. Counsel are directed to the Court's website, www.wawd.uscourts.gov, for a detailed description of the requirements for filing via CM/ECF. Plaintiff shall file all documents electronically. All filings must indicate in the upper right hand corner the name of the magistrate judge to whom the document is directed.

Any document filed with the Court must be accompanied by proof that it has been served upon all parties that have entered a notice of appearance in the underlying matter. Plaintiffs subject to the Court's E-Filing Pilot Project shall indicate the date the document is submitted for e-filing as the date of service.

1 (4) Non-State Defendants

2 As a registered user of the Court's electronic filing system, you must accept electronic
3 service of all court filings (**except** original service of a complaint) by prisoner litigants housed at
4 the Washington State Penitentiary (WSP) or Stafford Creek Corrections Center (SCCC) who are
5 subject to the Court's E-Filing Pilot Project. WSP and SCCC prisoner litigants are no longer
6 required to serve their court filings on the Court or defendants by mail. Service by mail of your
7 court filings to WSP and SCCC prisoner litigants is also no longer required.

8 (5) Motions, Generally

9 Any request for court action shall be set forth in a motion, properly filed and served.
10 Pursuant to LCR 7(b), any argument being offered in support of a motion shall be submitted as a
11 part of the motion itself and not in a separate document. The motion shall include in its caption
12 (immediately below the title of the motion) a designation of the date the motion is to be noted for
13 consideration upon the Court's motion calendar.

14 Stipulated and agreed motions, motions to file over-length motions or briefs, motions for
15 reconsideration, joint submissions pursuant to the option procedure established in LCR 37(a)(2),
16 motions for default, requests for the clerk to enter default judgment, and motions for the court to
17 enter default judgment where the opposing party has not appeared shall be noted for
18 consideration on the day they are filed. *See* LCR 7(d)(1). All other non-dispositive motions
19 shall be noted for consideration no earlier than the third Friday following filing and service of the
20 motion. *See* LCR 7(d)(3). All dispositive motions shall be noted for consideration no earlier
21 than the fourth Friday following filing and service of the motion. *Id.*

1 For electronic filers, all briefs and affidavits in opposition to either a dispositive or non-
2 dispositive motion shall be filed and served not later than 11:59 p.m. on the Monday
3 immediately preceding the date designated for consideration of the motion.

4 The party making the motion may electronically file and serve not later than 11:59 p.m.
5 on the date designated for consideration of the motion, a reply to the opposing party's briefs and
6 affidavits.

7 (6) Motions to Dismiss and Motions for Summary Judgment

8 Parties filing motions to dismiss pursuant to Rule 12 of the Federal Rules of Civil
9 Procedure and motions for summary judgment pursuant to Rule 56 of the Federal Rules of Civil
10 Procedure should acquaint themselves with those rules. As noted above, these motions shall be
11 noted for consideration no earlier than the fourth Friday following filing and service of the
12 motion.

13 Defendants filing motions to dismiss based on a failure to exhaust or motions for
14 summary judgment are advised that they MUST serve a *Rand* notice concurrently with motions to
15 dismiss based on a failure to exhaust and motions for summary judgment so that *pro se* prisoner
16 plaintiffs will have fair, timely and adequate notice of what is required of them in order to
17 oppose those motions. *Woods v. Carey*, 684 F.3d 934, 941 (9th Cir. 2012). The Ninth Circuit
18 has set forth model language for such notices:

19 A motion for summary judgment under Rule 56 of the Federal Rules of
20 Civil Procedure will, if granted, end your case.

21 Rule 56 tells you what you must do in order to oppose a motion for
22 summary judgment. Generally, summary judgment must be granted when
23 there is no genuine issue of material fact – that is, if there is no real
dispute about any fact that would affect the result of your case, the party
who asked for summary judgment is entitled to judgment as a matter of
law, which will end your case. When a party you are suing makes a

1 motion for summary judgment that is properly supported by declarations
 2 (or other sworn testimony), you cannot simply rely on what your
 3 complaint says. Instead, **you must set out specific facts in declarations,**
 4 **depositions, answers to interrogatories, or authenticated documents,**
 5 **as provided in Rule 56(e), that contradict the facts shown in the**
 6 **defendant's declarations and documents and show that there is a**
 7 **genuine issue of material fact for trial. If you do not submit your own**
 8 **evidence in opposition, summary judgment, if appropriate, may be**
 9 **entered against you. If summary judgment is granted, your case will**
 10 **be dismissed and there will be no trial.**

11 *Rand v. Rowland*, 154 F.3d 952, 963 (9th Cir. 1998) (emphasis added).

12 Defendants who fail to file and serve the required *Rand* notice on plaintiff may have their
 13 motion stricken from the Court's calendar with leave to re-file.

14 (7) Direct Communications with District Judge or Magistrate Judge

15 No direct communication is to take place with the District Judge or Magistrate Judge with
 16 regard to this case. All relevant information and papers are to be directed to the Clerk.

17 (8) The Clerk is directed to send copies of this Order and of the Court's *pro se*
 18 instruction sheet to plaintiff. The Clerk is further directed send a copy of this Order and a
 19 courtesy copy of plaintiff's complaint to the Attorney General of Washington State, by first-class
 20 mail.

21 Dated this 24th day of August, 2015.

22 

23 David W. Christel
 United States Magistrate Judge